

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF OHIO
3 WESTERN DIVISION

3 UNITED STATES OF AMERICA Case No. 3:06CR719
4 Plaintiff, Cleveland, Ohio
5 Thursday, May 29, 2008
6 1:00 p.m.

5 -vs-

6 MOHAMMAD ZAKI AMAWI, et al., VOLUME 59
7 Defendants. Pages 6273-6354

8 TRANSCRIPT OF PROCEEDINGS
9 BEFORE THE HONORABLE JAMES G. CARR
10 UNITED STATES DISTRICT JUDGE

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25 Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE COURT: You can be seated. Let's go to work.

How are we doing?

MR. SOFER: I'm pleased to report, Your Honor, that we've made much progress. There are a few issues which we are seeking the Court's guidance and ruling on. I'm sure counsel will promptly bring to my attention anything that I accidentally skip, but there are a few issues which the Government and/or the defense are still going to look at ourselves, and we may be able to resolve a number of them. I will try not to bring those to the Court's attention if it is acceptable to counsel, and instead stick to the ones we have a problem with.

The first and foremost is probably the First Amendment charge. Your Honor, the defense is seeking a First Amendment charge in this case. The Government believes that would be inappropriate for a number of different reasons.

THE COURT: Which -- hold on one minute. I'm trying to get into my instructions.

What instruction number is that on the defense?

1 MS. CLEARY: Your Honor, it is Instruction
2 Number 31 on Page 47 of our draft.

3 THE COURT: Okay. My computer is not
4 cooperating. Number 31?

5 MS. CLEARY: Yes, Your Honor.

6 THE COURT: And you include some citations.
7 The footnote twelve, *Mufid*, it is an '04 case. Does
8 anyone know anything about that case? Was there
9 anything reported about that?

10 MR. WITMER-RICH: Unfortunately, Your
11 Honor --

12 THE COURT: Was this charge used, or a
13 variant?

14 MR. WITMER-RICH: My understanding is that
15 this charge -- I'll just quickly -- Dave Doughten was
16 entirely responsible for this charge. He is now at his
17 daughter's high school graduation, and the rest of us
18 don't know a whole lot about it.

19 My understanding is this charge was used, I
20 don't know if it's the exact, but I'm sure exact parts
21 of this he copied from this case, from the Northern
22 District of Texas.

23 THE COURT: Well, give me half a second,
24 please.

25 I can't find -- I find his name in Westlaw in

1 the Holy Name Relief Foundation case in Texas. I
2 assume that is also Northern District. I have no idea
3 whether that -- do you know whether there was a
4 separate prosecution of him, or do you have any idea?

5 MR. SOFER: I don't know, Judge.

6 THE COURT: I mean, I have no idea. Well, do
7 you know of any cases in which this was, this kind of
8 instruction was requested and not --

9 MR. SOFER: I know that there are a number of
10 cases where courts have found that a First Amendment
11 instruction such as this is inappropriate, and I can
12 cite the Court to a number of cases.

13 There are two sort of veins to the
14 Government's argument. There are a series of cases
15 that talk about the fact that a constitutional
16 principle such as this is actually appropriately
17 directed to the Court and not to the jury, and to
18 instruct the jury on constitutional law in effect
19 invites the jury to nullify, to slight the existence of
20 evidence supporting the indictment.

21 Cases that support that concept, Your Honor,
22 would include the *Brochu* --

23 THE COURT: I tell you what. I probably am
24 not going to be able to get you an answer to this until
25 sometime Tuesday, so if you will both make -- there may

1 be other issues that I'm going to ask you to do this,
2 but if you both send me any case citations you find
3 between now and, you know, close of business on Monday,
4 because I'm out of -- say 3:00 Monday afternoon.

5 MR. SOFER: Not a problem, Judge. We'll do
6 that. If I may just say --

7 THE COURT: Go ahead.

8 MR. SOFER: That one vein is important. The
9 second vein, which I think is even more germane here,
10 is many of the cases where this kind of instruction is
11 given are cases in which the defendant published or
12 distributed to the public or in a public forum or in a
13 semi-public forum certain materials --

14 THE COURT: In other words, he entered the
15 marketplace of ideas, and criminal charges resulted.

16 MR. SOFER: Exactly. And it was the speech
17 itself that is in the marketplace of ideas, or some
18 sort of speech inciting some sort of action in
19 particular that was the subject of the prosecution.

20 THE COURT: In other words, excuse me, but
21 had these defendants, for example, gone out to the mall
22 and passed out flyers, "sign up for jihad"?

23 MR. SOFER: Indeed, or posted things on the
24 Internet, perhaps, which was not the subject of this
25 particular prosecution.

1 To term a Latin phrase, I believe, Your
2 Honor, a *fortiori*, the conspiracy charge in this case,
3 because of what it requires the Government to prove,
4 because there must be an overt act, because there must
5 be an agreement, because the elements of conspiracy
6 must be met, would necessarily then preclude the jury
7 from convicting the defendants for something that was
8 First Amendment protected speech.

9 And on top of that, Judge, given the fact
10 that there's an 842(p)(2)(A) charge here, which is the
11 distribution of a particular kind of information, and
12 the fact that you have a conspiracy here, which is,
13 again, a particular type of interaction, the Government
14 believes this would be -- this would radically confuse
15 the jury.

16 One interesting point along the same line,
17 the 842(p)(2)(A) charge, which there was much debate
18 about in the Senate when it was passed, where people
19 thought it could infringe on the First Amendment, the
20 statute has written into it the fact that you must
21 transfer or distribute this information with the intent
22 that it further a Federal crime of violence. This was
23 debated at length, I believe, in the creation of the
24 legislation, and the same concept applies to the
25 conspiracy charge in this case.

1 We will provide the Court with either a brief
2 or some cases --

3 THE COURT: Well, I think nothing more
4 elaborate than a brief memo. Candidly, the shorter the
5 better. I'm not going to have much time -- I don't
6 have time to read a 20-page brief and you don't have
7 time to write a 20-page brief.

8 MR. SOFER: Yes, Judge. But it is really
9 important to the Government. We think this is fraught
10 with danger in terms of confusion to the jury.

11 MR. WITMER-RICH: Just very briefly, I would
12 submit that there are very important concepts in this
13 that are really critical to the defense, and for the
14 jury to understand, without regard to pure element or
15 not, that, you know, that association with particular
16 individuals themselves is not, you know, and so forth,
17 and that advocacy of certain ideas alone is not a
18 crime, and we also seek to provide Your Honor with case
19 citations --

20 THE COURT: I think I told the jurors that
21 certainly watching these videos was not criminal, and I
22 think -- I think at least some of them espousing
23 unpopular views is not criminal, and to the extent that
24 I might be inclined to grant this kind of -- that sort
25 of instruction, I'm not sure I would dress it up with a

1 lot of First Amendment reference. I would simply say
2 "Ladies and gentlemen, in order to convict, you have to
3 meet all" -- you know, "the Government has to persuade
4 you beyond a reasonable doubt of each and every single
5 element, and the mere advocacy of unpopular ideas or
6 even conduct that you might find to be offensive or
7 undesirable in discussing such conduct with others is
8 not criminal unless the Government proves that the
9 crime as defined in this or these instructions
10 occurred."

11 MR. WITMER-RICH: Understood, Your Honor.

12 THE COURT: Something like that.

13 MR. SOFER: And I would just note, Judge,
14 we'll go through some of this. Some of what counsel
15 wants is already in the conspiracy instruction.

16 THE COURT: All right.

17 MR. SOFER: So including just mere
18 association or presence with --

19 THE COURT: That is standard conspiracy law.

20 MR. SOFER: So we'll do that, Judge.

21 If we can, Judge, I would like to try to go
22 through these as quickly as possible. We will again,
23 and I ask defense counsel, please tell me if I skipped
24 over something that we need to bring to Your Honor's
25 attention.

1 The first issue that I have that we wanted to
2 notify the Court was on Page 7 of the Government's
3 submitted proposed jury instructions, which is Jury
4 Instruction Number 6. It deals with recordings and
5 transcripts of recordings.

6 THE COURT: Give me half a second, please.
7 Page? Whose set of instructions?

8 MR. SOFER: By the way, I think we've agreed,
9 and again, counsel will stop me, but because we agreed
10 more often than not that the Government's instructions
11 were acceptable, so we don't end up creating some new
12 multi-colored document for Your Honor, we'll go with
13 the Government's set of instructions. We'll modify
14 them in accordance with whatever changes we agree to,
15 or whatever Your Honor tells us to.

16 This is again instruction number six. It
17 deals with recordings and transcripts, and we're
18 talking specifically about the second sentence and
19 third sentence, which state "the use of these
20 procedures to gather evidence is lawful, and the
21 Government is entitled to use these conversations in
22 this case. Accordingly, these recordings are a proper
23 form of evidence that may be considered by you, just as
24 any other evidence."

25 The defense, I believe, objects to the

1 inclusion of this language.

2 THE COURT: What if I were to do this? In
3 the first sentence "during this trial, you heard
4 lawfully-obtained audio and video recordings."

5 MR. SOFER: That would be fine with the
6 Government, Judge.

7 THE COURT: And I can see deleting the two
8 sentences.

9 MR. WITMER-RICH: We would object to the
10 "lawfully obtained." It simply emphasizes -- all of
11 the evidence presented to the jury in this case has
12 been determined by Your Honor to be legally admissible,
13 and it gives emphasis to one --

14 THE COURT: Yes. Why not?

15 MR. SOFER: The reason for this instruction,
16 the reason this kind of language is often included in
17 this instruction is that the jury, the jury doesn't
18 really know that. The jury doesn't know whether there
19 is something untoward about recordings and the way they
20 are recorded. So in some way, and again, we're not
21 asking for a lot of language about this, but I do think
22 it is appropriate to tell the jury that this was not
23 done illegally, this was not Darren Griffin violating
24 the law in some way. Counsel has beat up on Darren
25 Griffin quite a bit in this case. You take that plus

1 the notion of a secretly recorded conversation, and I
2 think you end up with an inference that's unfavorable
3 to the Government. Again, we're not asking for much of
4 a retort to that, but something from the Court that
5 indicates that this technique is very common, perfectly
6 appropriate, and lawfully conducted.

7 The jury doesn't know -- I mean, when you
8 read about Linda Tripp going to jail or something for
9 having violated a state statute, for instance, even
10 though it is a professional recording, the jury is not
11 going to be able to parse that out.

12 MR. WITMER-RICH: I would argue omitting the
13 two sentences we objected to. We still want an
14 instruction that tells the jury a little bit about the
15 recording that says they were done with the knowledge
16 and consent of Mr. Griffin --

17 THE COURT: Where is that? Point me to that.

18 MR. WITMER-RICH: The first sentence --

19 THE COURT: Where?

20 MR. WITMER-RICH: Government's instruction --

21 THE COURT: The same instruction?

22 MR. SOFER: Same instruction.

23 MR. WITMER-RICH: Correct.

24 THE COURT: First paragraph, second
25 paragraph?

1 MR. WITMER-RICH: In the first paragraph,
2 which starts with "during this trial."

3 THE COURT: Okay.

4 MR. WITMER-RICH: And we want to delete the
5 second and third sentences only, and if we were to do
6 so, we would still be left with an instruction that
7 talks about the recordings and says a few things about
8 how the jury may consider them.

9 I would argue that that pretty much negates
10 the fear that Mr. Sofer expressed that the jury somehow
11 will think these are improper or illegal, because the
12 Court specifically, while not drawing specific
13 attention to the fact --

14 THE COURT: Where do you think this is sort
15 of alluded to?

16 MR. WITMER-RICH: First it says they were
17 done with the knowledge and consent of one of the
18 parties, Mr. Griffin --

19 THE COURT: Where? Again, where are you
20 reading?

21 MR. WITMER-RICH: First sentence, Your Honor.

22 THE COURT: Okay.

23 MR. SOFER: And Your Honor, if the defense
24 thinks the two sentences are too much, then to
25 compromise with Your Honor's suggestion, just putting

1 the one word at the top and omitting the two
2 sentences --

3 THE COURT: For now, I'm going to do that.
4 If you want me to revisit that, if you have some
5 authority that says that that is -- the other thing I
6 would suggest to you, if you want to suggest as perhaps
7 an alternative, I assume that somewhere in here there
8 is a "what is evidence" kind of instruction, and if you
9 want, perhaps, to have me say something in there, you
10 know -- I do tell them, I'm sure, if you use the
11 boilerplate, that you are entitled to consider all the
12 evidence or you should consider all the evidence, and
13 perhaps something to the effect that it has been
14 presented to you, it should be taken by you as an
15 indication that it has been lawfully obtained and
16 acquired and presented for your consideration.

17 If you want to think about something like
18 that, that diminishes the kind of highlighting on this
19 that I think is of concern to you, and I -- I don't
20 think it is such a bad idea to tell the jury, you know,
21 as a matter of law, this stuff was always -- this is
22 all properly in front of you. There are times, I'm
23 sure, when jurors kind of wonder, even with an ordinary
24 search and seizure, they see these cop shows with
25 people being shoved down face first on the ground, and

1 I think -- I agree with Mr. Sofer that I think there is
2 a lot of -- I think on the part of some jurors, and it
3 wasn't something we really questioned them about, I
4 think there is kind of this, "Oh, that is kind of
5 nasty".

6 I don't think it is entirely inappropriate to
7 say, but it is okay. So why don't you fuss with that,
8 if you want to propose that as kind of an alternative
9 to this.

10 For now, delete those two sentences in your
11 working drafts, and in the first line, between the word
12 "conversations" and "recorded," insert "lawful."
13 That's tentative, but I think you see where I'm headed.
14 I think that would fit better in that sort of general
15 "what is evidence," and add a sentence there that says
16 "the evidence presented to you by the parties is
17 lawfully before you." Maybe even something as simple
18 as that.

19 In fact, I would suggest that as an
20 alternative. I think I would prefer that. Because
21 that also indicates that regardless of any wrangles
22 that preceded it, any objections, it is a little less
23 emphatic in what it is talking about. And that would
24 be an agreeable alternative to inserting "lawfully"
25 here to the Government. Let them know after you think

1 about it.

2 MR. SOFER: We'll take a look and talk.

3 We're going to end up talking anyway.

4 THE COURT: Next?

5 MR. SOFER: We had a disagreement on Jury
6 Instruction Number 7, which is on Page 9 of the
7 Government's proposed instructions. Similar concept,
8 Your Honor. This had been actually discussed I think
9 at side bar. There were various objections raised,
10 some of it sort of implied.

11 THE COURT: You know, candidly, I think that
12 is probably something you can mention in argument. It
13 seems to me it is more argument. Anything we didn't do
14 is not evidence, and that we didn't do something is so
15 what, ladies and gentlemen?

16 MR. SOFER: Understood. The defense wants
17 part of this charge, as does the Government, but they
18 want it dissected in a way that would lead the
19 Government to say exactly what Your Honor just did. So
20 our position is if they win on the "take this line
21 out," we want the whole thing withdrawn.

22 MR. WITMER-RICH: And I would be content with
23 the whole thing in. I'm content with this instruction
24 as it is.

25 THE COURT: Somebody tell me what is going on

1 then. The Government is proposing it be withdrawn and
2 he likes it the way it is.

3 MR. EL-KAMHAWY: If you look at Government's
4 Exhibit 7, on Page 8 --

5 THE COURT: Number 7?

6 MR. EL-KAMHAWY: Correct. Government 7.

7 THE COURT: I have it on Page 10, actually.

8 MR. EL-KAMHAWY: If you march three lines up
9 from the bottom, the beginning of the sentence "in that
10 respect, law enforcement techniques are not your
11 concern."

12 THE COURT: Is that -- you want that out or
13 in or what?

14 MR. EL-KAMHAWY: We would like this out, Your
15 Honor, because it basically takes out of the providence
16 of the jury attributing certain weight to certain
17 Government techniques, how to extract information or
18 how to gather information. I think it is within the
19 providence of the jury to decide what if any weight or
20 what if any credibility to attach to the evidence
21 presented by the Government as it relates to the
22 technique that was used in obtaining this information,
23 to instruct the jury they should not worry about how
24 this information came into the light. I think it is
25 violation of the Fourth Amendment, you know.

1 MR. SOFER: And Judge, I think that's a
2 misstatement of the law, but our position is simply if
3 that sentence is out, we would ask that the Court not
4 give this instruction, because what it ends up doing is
5 slanting it so much that it ends up being more
6 prejudicial than helpful in any way. Let me look at
7 it, now that I at least understand what the fuss is
8 about.

9 What if I were to substitute something along
10 the lines, instead of that sentence, to substitute for
11 it "whatever the Government might not have done, and
12 what evidence it might have developed is not to be
13 considered by you." Does that fix the problem? I
14 don't understand the problem, so I'm not sure.

15 MR. WITMER-RICH: That's precisely the reason
16 we like the instruction at least in its entirety. The
17 first sentence says, "You have heard reference to the
18 fact that certain investigative techniques were used.
19 You may consider these facts in deciding whether the
20 Government has met its burden of proof."

21 Certainly, our office has argued in many
22 cases the Government's failure to do X, Y and Z is
23 something you should consider in determining whether
24 they have met their burden, and the Government is not
25 legally required to do X, Y and Z. The instruction

1 tells them not, but the Government's failure to use
2 investigative techniques they could have used is
3 relevant and the jury may consider that.

4 Again, the instruction says they are not
5 legally required to do so, it makes that very clear,
6 but for us -- it is important that we're permitted to
7 argue that the Government could have done X and they
8 didn't do X, and you may consider that in deciding
9 whether this evidence, the Government has carried its
10 burden.

11 MR. SOFER: And I think, Judge, that is
12 not --

13 THE COURT: Are you sure? That is not
14 evidence. It leads them to speculate well, you know,
15 if they had, you know -- I don't know, put a bug in the
16 dining room table at the social club in Little Italy, I
17 mean, it leads the jury to kind of speculate, and
18 distracts them from considering the evidence.

19 MR. WITMER-RICH: I think it is like a case
20 where --

21 MR. EL-KAMHAWY: Your Honor, we withdraw the
22 objection.

23 MR. WITMER-RICH: Defense lawyers often argue
24 they didn't take fingerprints off the gun, and I think
25 that's a common argument.

1 THE COURT: Okay. I understand. I mean,
2 there is a difference, I think, between that and --
3 well, whatever. I think the objection was just
4 withdrawn, in which case there is no fuss.

5 MR. SOFER: Well, there will be a fuss if
6 that argument certainly is advanced and they point to
7 this jury instruction as some sort of justification for
8 making that argument for the very reason Your Honor
9 just stated.

10 THE COURT: But I think the sentence that you
11 wanted in is still in.

12 MR. SOFER: I understand, Judge. All I'm
13 saying is --

14 MR. WITMER-RICH: He is anticipating an
15 objection in closing argument.

16 MR. SOFER: I object to them making that
17 argument if that's what they are trying to do to the
18 jury.

19 MR. WITMER-RICH: And I'm saying I'm here
20 trying to represent an instruction we want without
21 knowledge of how the closing argument is going to be
22 phrased.

23 THE COURT: I will deal with any objection in
24 the argument when it is raised. That is next week.
25 This is today.

1 MR. SOFER: I understand. I think we killed
2 this bird, Your Honor, so to speak.

3 THE COURT: No. He is still in full flight.
4 Next?

5 MR. SOFER: The next place --

6 THE COURT: I don't think I have ever had a
7 lawyer shoot at his own instruction, but that's okay.
8 Lots of firsts in this case, including one when it ends
9 earlier than advertised.

10 MR. BOSS: It is not over yet.

11 THE COURT: I know that. You are not going
12 to argue for six weeks, though. Go ahead, Mr. Sofer.

13 MR. SOFER: The next instruction is Jury
14 Instruction Number 13 on Page 16 of the Government's
15 proposed jury instructions.

16 THE COURT: Number 13? Okay.

17 MR. SOFER: It is "testimony of a cooperating
18 witness." We agreed to change it to "testimony of a
19 paid cooperating witness."

20 The defense has asked for the removal of a
21 number of different sentences here, and the Government
22 disagrees strongly with the removal of these particular
23 provisions.

24 Firstly, again, I'm sure counsel will correct
25 me if I am missing something, in the second paragraph,

1 the third sentence, the line is "in assessing this
2 testimony, however, you should consider whether, and
3 the extent to which the witness' testimony may have
4 been influenced by what benefits he may have received."
5 I won't read the rest of it.

6 THE COURT: Hold on. I'm sorry. I just got
7 an E-Mail I have to respond to. Give me half a minute.

8 MR. SOFER: Okay.

9 THE COURT: Sorry.

10 MR. SOFER: That's quite all right, Your
11 Honor.

12 THE COURT: Okay. I apologize.

13 MR. SOFER: This is Page 16, Your Honor, Jury
14 Instruction Number 13.

15 MR. BOSS: Mr. Sofer's edition is not the
16 same. Maybe you can just follow the instruction.

17 MR. SOFER: I think, Your Honor, I don't know
18 whether it is working for Your Honor or not --

19 THE COURT: Page what?

20 MR. SOFER: 16, Jury Instruction Number 13.

21 THE COURT: Okay. I have it. For some
22 reason, there is a peculiar page break. Okay.
23 Cooperating witness. Gotcha. Okay.

24 MR. SOFER: Now, we agreed, again, to change
25 this to "paid cooperating witness."

1 THE COURT: Okay.

2 MR. SOFER: The sentence in question, or one
3 of the sentences in question is "in assessing this
4 testimony, however, you should consider whether and the
5 extent to which the witness' testimony may have been
6 influenced by what benefits he may have received," and
7 it goes on.

8 The defense had objected to the word
9 "however" and the words "and the extent to which."
10 They want all that out, and just that sentence they
11 would like to read "in assessing this testimony, you
12 should consider whether the witness' testimony may have
13 been influenced."

14 This is, I understand, a relatively minor
15 point, but the Government does believe that this
16 qualifying language is important, and I think the
17 general issue we have here is -- and this will apply to
18 the other two objections that the defense has -- the
19 defense believes that there is -- we think that this
20 instruction talks about sort of things that are
21 different about a paid witness, but should also include
22 some of the things that are the same about a paid
23 witness.

24 For instance, the fact that "you should
25 consider his testimony in light of all the evidence

1 presented in the case," the defense also thinks that
2 should be removed, and the last sentence, which says --

3 THE COURT: I don't think that should be
4 removed.

5 MR. SOFER: I'm sorry, Judge?

6 THE COURT: I don't think that should be
7 removed, because that is "consider all the evidence in
8 light of all the other evidence."

9 MR. SOFER: Again, I think that's the --
10 again, they will correct me if I'm wrong -- the
11 ideological difference we have is that this should be
12 an even instruction. It does say that specifically,
13 that you should consider this testimony with more
14 caution than the testimony of a witness --

15 THE COURT: And that's standard.

16 MR. SOFER: But it should also, the
17 Government believes, include the things about a
18 cooperating witness' testimony that are the same as
19 other witnesses. Specifically, this may be the most
20 important disagreement, is the last sentence, that says
21 "just as with any other witness, you cannot find the
22 defendant guilty beyond a reasonable doubt solely on
23 unsupported testimony of such a witness standing alone,
24 unless you believe the witness' testimony beyond a
25 reasonable doubt."

1 Same concept. We think it should be in
2 there, because it shows what is similar about it.

3 THE COURT: Has this come from any standard,
4 *Devitt & Blackmar, Sand*, or anybody like this?

5 MR. SOFER: This was adapted from the Sixth
6 Circuit pattern jury instruction as well as Your
7 Honor's instruction, I think it was Your Honor's
8 instruction in *United States versus Michael Baker* from
9 November 30, 2007. We did add some small snippets of
10 language to this, but it was an attempt at what we
11 thought would make it an even handed instruction.

12 THE COURT: They made you take out the brave,
13 loyal, devout Darren Griffin.

14 MR. TERESKINSKI: May I add, Your Honor, the
15 reason we went to the other case, the instruction in
16 November of '07, the case of the *United States versus*
17 *Michael Baker* is because the actual pattern instruction
18 doesn't really kind of contemplate sort of
19 Mr. Griffin's situation. He is not necessarily just
20 a -- he is not a paid informant, he is a cooperating
21 witness that happens to be paid. So we looked to Your
22 Honor's language in *Baker* for cooperating, and that's
23 why we put the other language in.

24 MR. WITMER-RICH: I mean --

25 THE COURT: What does the pattern say?

1 MR. WITMER-RICH: The pattern for the -- the
2 Sixth Circuit pattern for testimony of a paid informant
3 in relevant part says --

4 THE COURT: I would much prefer to abide by
5 the pattern.

6 MR. WITMER-RICH: That would be great with
7 us.

8 THE COURT: It is risky. Even if I gave it
9 before, I probably didn't have, you know, argument
10 about it. I may have just thrown it in there and
11 invented it, I don't know, but --

12 MR. WITMER-RICH: We would submit the pattern
13 would be perfect for us.

14 THE COURT: Talk between the two of you. I
15 will -- my strong inclination is to simply insert the
16 pattern, especially if it relates to paid payments to a
17 witness.

18 MR. WITMER-RICH: Thank you, Your Honor.

19 THE COURT: Okay? When in doubt, go with
20 what they tell you to use. Not even when in doubt.
21 Okay.

22 So you guys talk to each other, and if there
23 is a fuss about it, let me know. Would you send me --
24 if you are still fussing about this, send me, with
25 whatever you send me, send me the pattern, because I

1 don't have it at home, which is where I will be.

2 MR. WITMER-RICH: Yes, Your Honor.

3 MR. SOFER: The next section, Your Honor,
4 where there is a series of issues relates to the -- and
5 again, I believe this was debated the first time, in
6 the preliminary jury instructions, the name of the
7 statute, 2339(a), which is conspiracy to provide
8 material support or resources to terrorists. We've
9 referenced that in every place where we've discussed
10 the statute.

11 MR. WITMER-RICH: Which I think is twice.

12 MR. SOFER: Which is at least twice, maybe
13 more than that. I'm not going to go through it all.
14 We've identified two instructions. The first one --
15 and Your Honor, the point I think I would make here,
16 Your Honor, is first of all, Your Honor has already
17 given this instruction to the jury. That was the
18 preliminary instruction on the charge to conspiracy to
19 provide material support or resources to terrorists,
20 and we thought it was correct then and we still think
21 it is correct. The jury has already heard it. It has
22 been given, I believe, in a number of other cases
23 around the country, and I don't believe that the
24 defense would have objection to it.

25 MR. WITMER-RICH: The objection is to the

1 word "terrorists," which appears in the title of the
2 statute but does not appear in the elements of the
3 offense in any of the crimes. There is no definition
4 of what terrorists are, so it simply kind of casts a
5 pall over the case that is unrelated to the legal
6 elements of the case at all. The case is about
7 providing material support and resources in furtherance
8 of specified crimes, and that's specified in the
9 instruction --

10 THE COURT: What did I do before?

11 MR. WITMER-RICH: I do not recall what you
12 did in the preliminary instructions, Your Honor.

13 The Government represents that it was -- that
14 it was described as conspiracy to provide material
15 support or resources to terrorists.

16 MR. SOFER: It was, Your Honor.

17 THE COURT: Excuse me. I believe the caption
18 is part of the statute as a matter of law.

19 MR. SOFER: That's what I wrote in here.
20 Blame Congress is what I wrote.

21 THE COURT: If you want to say that in front
22 of the Sixth Circuit, that's fine.

23 I'm going to abide by what I did before, and
24 I'm going to -- I can't recall whether you objected at
25 the time. Even if you didn't, I don't consider that to

1 be a waiver of your right to object now and for me to
2 think about it again, but for two reasons I'm going to
3 overrule the objection. Three reasons. Number one,
4 that is what I did before. The first reason really is
5 because it is my understanding that the title is part
6 of the statute. It is an enactment by Congress. It is
7 not some commentary, it is not like the Mann Act is the
8 shorthand or whatever for that statute. This is in the
9 statute itself.

10 Secondly, it is what I did before, and
11 thirdly, I think, quite candidly, I tried to emphasize,
12 and over the Government's objection, that this is not a
13 case involving foreign-based terrorism or whatever, so
14 I think there is a counterweight to that concern. And
15 I think that you are and you will be able to argue, if
16 you want, ladies and gentlemen, you know, you have
17 heard the statute referred to as providing material
18 support to terrorism; terrorism has nothing to do with
19 the elements of the statute. You have to decide the
20 case, as the Court told you, solely on the basis of the
21 elements and the law.

22 MR. WITMER-RICH: And respectfully, that is
23 an argument I would make to Your Honor. I don't think
24 it is a particularly effective argument for a jury.
25 And again, I just would lodge a strong objection to

1 this. It is the title of the statute, which I think
2 the case law, you know, consistently acknowledges is
3 not -- you know, it does not modify the element of the
4 statute, does not give meaning to the element of the
5 statute. It is simply to be ignored when construing a
6 statute --

7 THE COURT: If you want to propose some
8 moderating language to go in there, you can do so. In
9 other words, that would say something to the effect --
10 let me --

11 MR. WITMER-RICH: The statute doesn't specify
12 who is receiving the material support, and in that
13 sense it is slightly awkward. So you don't have to
14 prove who is receiving the material support.

15 THE COURT: I understand.

16 MR. WITMER-RICH: You just have to prove what
17 the material support is in furtherance of. The
18 conduct.

19 THE COURT: What number are we talking about?

20 MR. WITMER-RICH: We're talking about
21 Government Jury Instruction Number 16.

22 MR. SOFER: If I could just --

23 THE COURT: Let me take a look at that.
24 Well, 16. Yes. Okay.

25 (Discussion off the record.)

1 THE COURT: I'm sorry. Let me take a quick
2 look at that.

3 MR. SOFER: I'm sorry. Your Honor is looking
4 at 2339(a)?

5 THE COURT: Let me look at the instruction.
6 What's the other instruction?

7 MR. SOFER: It is found also in 17, which is
8 multiple -- every time you list a charge --

9 THE COURT: Let me suggest that it is --
10 perhaps 16, perhaps the second sentence read "the
11 caption to the statute under which the defendants --
12 the criminal conduct -- "the statute under which the
13 criminal conduct charged against the defendants, the
14 caption reads," or something like that. Would that --

15 MR. WITMER-RICH: I would propose you simply
16 delete the word "to terrorists" and it adequately
17 describes the charge. It is conspiracy to provide
18 material support or resources.

19 MR. SOFER: And Judge, that sort of takes the
20 whole meaning out of it. Again --

21 THE COURT: I understand.

22 MR. SOFER: The Court has, over the
23 Government's objection, made numerous --

24 THE COURT: Time out. I'm going to let you,
25 if you have some legal basis for me to change my mind,

1 but I'm going to leave it. I'm inclined to. Or if you
2 want to provide something, some kind of alternative
3 formulation for me to consider along the lines that I
4 was trying to before I, Any and I were talking for a --
5 moment --

6 MR. SOFER: Judge, the point is --

7 THE COURT: I understand.

8 MR. SOFER: I'm sorry.

9 THE COURT: I understand. I'm saying I'm
10 leaving this the way it is.

11 MR. SOFER: I understand.

12 THE COURT: For now. I think we ought to
13 probably envision perhaps a phone conference Tuesday
14 afternoon, maybe around 4:00.

15 MR. SOFER: Fine, Judge. Again, I would note
16 for the record, Your Honor, given this instruction, you
17 have given multiple instructions, which I think --

18 THE COURT: And that's exactly why I'm
19 disinclined, and certainly, though, if you have case
20 law that says it is error to incorporate a caption, A
21 or B, to incorporate the caption where the caption,
22 there is some disconnect between the caption and the
23 content of the statute, then fine. But for the three
24 reasons I indicated, consistency, my understanding is
25 that the caption is part of the statute, and also, I

1 think the counterbalancing statements that I have made
2 to the jury, which I think you are entitled to remind
3 the jury of, "The Judge has told you, ladies and
4 gentlemen, this is not a case about Al-Qaeda coming
5 into northwest Ohio and recruiting." I think the jury
6 understands that. I think, you know, there is nothing
7 in the case about any particular group or organization.
8 They tried, even anticipated being affiliated. I mean,
9 the most I think the Government has shown is a desire
10 to go overseas and hook up with somebody and do some
11 things that the Government considers criminal.

12 MR. SOFER: Again, Judge, we disagree with
13 that statement by the Court.

14 THE COURT: I know you do.

15 MR. SOFER: I don't want to go through that
16 again. I ask that you not repeat that instruction,
17 certainly, before we get to sum up the evidence --

18 THE COURT: I intend to read what's here, and
19 that's it.

20 MR. SOFER: But nevertheless, at the very
21 least, the weight of those repeated statements to the
22 jury I think pummels this. Just mentioning the name of
23 the statute into something that is far from harmful --

24 THE COURT: I agree with you. Okay.

25 MR. SOFER: The next issue, Your Honor --

1 THE COURT: The one point that might cause me
2 to change my mind, and I will not do so with finality
3 until we talk, is if they say, Judge, here is the
4 United States versus Smith, a 2007 Sixth Circuit case,
5 that said there is a syntactical disconnect between the
6 elements of the crime and the caption of the statute
7 where after a three month trial, the Judge got
8 reversed. Then I might change my mind.

9 MR. SOFER: We might, too, Judge.

10 THE COURT: Anyway, go ahead. Next?

11 MR. SOFER: The next jury instruction is Jury
12 Instruction Number 18. It was on Page 22. It is on
13 Page 22 of the document I have, which means it is
14 certainly close to that.

15 THE COURT: I've got it. I'm going by jury
16 number. How many more do we have? I'm just curious.

17 MR. SOFER: We don't have that many more.
18 We're going to have -- the biggest issue relates to the
19 conspiracy under two specific conspiracy charges.
20 That's where the rubber will meet the road. These are
21 relatively minor issues, I think. But I think we
22 certainly can get through them in the next half hour or
23 hour, if we can move quickly.

24 THE COURT: Okay.

25 MR. SOFER: Here, Judge. This is a jury

1 instruction which relates to the general concept of
2 conspiracy law, and the first objection that the
3 defense has lodged relates to the third sentence in the
4 first paragraph, which says "common sense tells you
5 that when people agree to enter into a criminal
6 conspiracy, much is left to unexpressed understanding."
7 Every conspiracy charge I have ever heard has something
8 like that.

9 THE COURT: What does the pattern say? Here
10 again, there is a Sixth Circuit pattern instruction.
11 Even though there might be some difference, even if it
12 would only be syntax and diction rather than substance
13 between what I gave before, what the pattern says --

14 MR. WITMER-RICH: Part of -- I don't believe
15 this is in the pattern, but I'm not positive. I would
16 say that part of the difficulty here, which I'm sure
17 Mr. Sofer will elaborate on soon, is there are two
18 conspiracy charges and they have different elements.
19 The one does not have an overt act element and the one
20 does. They are different. So part of what the
21 Government has done, and we are trying to kind of work
22 to see how we can work with that, is to see how to
23 structure the charge in a certain way that does not
24 fall exactly within the Sixth Circuit patterns, which
25 is why we're -- why we have the deviation at this

1 point.

2 MR. SOFER: Judge, if I may -- I'm sorry. To
3 explain the structure concept, in an attempt to do this
4 efficiently, what we did was we tried to capture in
5 this first section -- and it probably does go beyond
6 what the Sixth Circuit says, but it includes points
7 that I think are directly related to the case, so to
8 just take a bold, simplistic conspiracy charge I think
9 would be problematic for a whole lot of different
10 reasons. Specifically, in light of the two statutes
11 that then follow.

12 What we tried to do is have a general section
13 on conspiracy law which would apply to both statutes,
14 and then because the two statutes have different
15 elements and because one requires an overt act and one
16 does not, because one says, I think, "willful" and the
17 other says "knowing," there is a slightly different
18 mens rea requirement. If we tried to do that in one
19 generic section, we would have defeated the specifics
20 of each of the statute. What we tried to do is have
21 the first section, which there is, I would say,
22 relatively little disagreement on the substance of
23 this, it is sort of -- where it is emphasized, I think
24 that the bigger problem is if counsel would agree, and
25 so we think -- we think that this is the -- we tried to

1 do this. We tried to figure out the easiest way of
2 doing this. The alternative to having a general
3 section and then two statutory sections that are
4 specific to the statutes that are being charged would
5 be to repeat the general section twice, and it will add
6 almost two pages, Judge.

7 We think it will overly complicate all this
8 and it would be far too repetitious. Again, we tried
9 to find some common ground between the statutes and
10 articulate the sections of the conspiracy law that are
11 applicable in this case, and then tried to break down
12 the statutes with respect to their unique elements.
13 I'm sorry for interrupting.

14 THE COURT: I'm reluctant to repeat something
15 twice.

16 MR. WITMER-RICH: I understand, Your Honor.

17 As to the narrow point that we first raised,
18 the line "common sense tells you that when people
19 agree," there is language in this which is I think
20 somewhat standard language, about the agreement does
21 not have to be explicit and what have you.

22 THE COURT: Right. Does that come from the
23 pattern? To that extent, I would just as soon abide by
24 the pattern.

25 MR. SOFER: I don't know that we have the

1 pattern here.

2 THE COURT: If not, I would rather not
3 include it, then.

4 MR. SOFER: I'm told that the common sense
5 language is not in the pattern.

6 THE COURT: I prefer to take it out. Again,
7 I think that's also argued. Common sense, you know.

8 MR. SOFER: Understood, Judge. We'll do it
9 that way.

10 We altered -- by the way, we'll send Your
11 Honor the things that -- after we've gone back and
12 forth with counsel one more time, we'll send you the
13 modified version of this, because we've agreed that 80
14 percent of the changes here we've agreed to, and we'll
15 make and send that to Your Honor.

16 The next section, other than this broader
17 issue, is on page -- the next page. It is in the third
18 paragraph.

19 THE COURT: What's the first word of the
20 paragraph?

21 MR. SOFER: "Rather, what is required is that
22 the defendants willfully entered into an illegal
23 agreement with a general understanding of the unlawful
24 purpose of the agreement."

25 THE COURT: Now, wait a minute. I'm sorry.

1 The same instruction?

2 MR. SOFER: Same instruction.

3 MR. WITMER-RICH: It is not a paragraph, I
4 don't think.

5 MR. SOFER: The third paragraph. It is the
6 end of the third paragraph.

7 THE COURT: I see. Okay.

8 MR. SOFER: Okay. And I'll let counsel say
9 what it is. They prefer that language be replaced by
10 some other language. I'm not sure either one is the
11 pattern instruction.

12 THE COURT: Well, if the pattern has language
13 that is equivalent, I want to do the pattern.

14 MR. WITMER-RICH: Here is what we think the
15 relevant language is. Rather than the language of
16 "willfully entered into an illegal agreement with a
17 general" --

18 THE COURT: Slower. Wait a minute. Go
19 ahead.

20 MR. WITMER-RICH: Rather than "willfully
21 entered into an illegal agreement with a general
22 understanding of the unlawful purpose," that's really
23 the heart of what we're not crazy about, "general
24 understanding of the unlawful purpose" --

25 THE COURT: Right.

1 MR. WITMER-RICH: The pattern reads "to
2 convict any defendant, the Government must prove that
3 he knew the conspiracy's main purpose, and that he
4 voluntarily joined it intending to help advance or
5 achieve its goals."

6 MR. SOFER: And, Judge, here is where we ran
7 into a problem in doing this. Again, unfortunately, I
8 don't recall standing here which of these two statutes
9 has a "willful" and which has a "knowing" element to
10 it, so here the "willful" statement talks only about
11 entering into an illegal -- willfully entering into an
12 illegal agreement --

13 THE COURT: Is there a pattern, is there a
14 distinctive pattern depending upon willful, and what is
15 intentional?

16 MR. WITMER-RICH: I'm not aware of one.

17 MR. SOFER: I believe "knowingly" is the
18 other.

19 THE COURT: That's right.

20 MR. SOFER: But again, the reason we did
21 this, Judge, and it's been -- we've gone back and forth
22 with our headquarters on this also. At least from our
23 perspective, we believe that this instruction has been
24 approved before as it relates to the statutes in
25 question here, and we were very cognizant of not trying

1 by -- by manipulating this, the danger is that you
2 somehow alter the mens rea requirement in one or both
3 of the other statutes. That's our concern. There may
4 be a way for us to address what counsel is saying
5 without doing that --

6 THE COURT: Let me suggest this, perhaps. In
7 the charge relating to the statute that uses
8 "willfully," in addition to defining that term with the
9 pattern, that has to be the pattern, say "you will
10 note" or "I note that to prove the conspiracy alleged
11 under this statute, you will note that this statute
12 uses 'willfully' to describe the mental state, and the
13 other conspiracy charge, whatever it is, used the term
14 'knowingly.' These are distinct terms, and they are
15 defined separately in these instructions, and you shall
16 apply these accordingly." Does that work?

17 MR. SOFER: It may, Judge. I think -- I
18 think what counsel is objecting to is the last --

19 MR. WITMER-RICH: Yes.

20 MR. SOFER: What we have a disagreement about
21 here is the very last clause of this. We added the
22 words "general understanding of the unlawful purpose of
23 the agreement," and the language, they think that it is
24 too broad and too open ended.

25 THE COURT: Why don't you say "willfully

1 entered into an illegal agreement, understanding the
2 agreement's unlawful purpose"?

3 MR. WITMER-RICH: I think that would be
4 acceptable to the defense.

5 MR. SOFER: And I think the reason that this
6 is --

7 THE COURT: I'm very concerned with the word
8 "general." That's --

9 MR. SOFER: I think that's the defense's
10 concern as well.

11 THE COURT: I would be willing to bet we'd
12 get the question, "What do you mean by general
13 understanding?" I would much prefer to say "entered
14 into an illegal agreement, understanding the unlawful
15 purpose of the agreement."

16 MR. WITMER-RICH: And I would agree with
17 that, and the briefest way I would put my objection is
18 that the pattern for knowingly joining a conspiracy is
19 that -- is what I read earlier. To prove that he knew
20 the conspiracy's main purpose and voluntarily joined
21 it. And I would say the addition of a willful
22 requirement, which this statute includes, shouldn't
23 result in some kind of dilution of that. It would only
24 increase the --

25 THE COURT: I would agree with that, but that

1 seems to me to be a more intense mental state.

2 MR. WITMER-RICH: Right. So that would be --
3 that would provide, I guess, the floor of --

4 THE COURT: If the general understanding is
5 not enough for knowingly, then it should not be enough
6 for willfully.

7 MR. SOFER: I guess the point that is
8 important for the Government here is that for a person
9 to be found guilty of conspiracy, they don't have to
10 know all of --

11 THE COURT: Right.

12 MR. SOFER: -- the illegal or unlawful
13 purposes, and that is where this general understanding
14 comes from. You need to know the general concept of
15 the unlawful agreement. You don't need to know the
16 specifics, nor do you need to know every aspect of it.
17 That may be addressed further in the charge. If it is
18 acceptable to the Court, we'll go back and see.

19 THE COURT: Let's take a two minute break.

20 (Recess had.)

21 THE COURT: Okay. I apologize for the
22 interruption. Go ahead.

23 MR. SOFER: I think we might be able to come
24 to some agreement with counsel regarding that in this
25 particular language, I do notice that Your Honor gave

1 the following instruction to the jury already, that the
2 Government must prove beyond a reasonable doubt that
3 the defendant voluntarily joined in the agreement and
4 was aware, one, of at least some of the basic aims and
5 purposes of the agreement. That was given, I think
6 that came from another charge that Your Honor had given
7 previously. We would change that language, we
8 considered changing it to the unlawful, knew to be
9 unlawful --

10 THE COURT: Understood.

11 MR. SOFER: "Unlawful purpose," and take out
12 the "general understanding."

13 THE COURT: That's the least of the problem
14 that I have with these two. It is too much of a
15 sliding scale.

16 MR. SOFER: What I think counsel is going to
17 ask for and what we object to strongly would be to try
18 to put the entire pattern here, because that is going
19 to cause problems on the other two counts and --

20 THE COURT: I'm sorry. Go ahead. The
21 pattern would be a problem?

22 MR. SOFER: Just the pattern would be a
23 problem. Your Honor had already gone beyond the
24 pattern, I believe, in the preliminary instruction, and
25 frankly, there are enough specific concepts that relate

1 to the particular facts in this case that the
2 Government's proposed instructions that relate to other
3 things that are not in the pattern, just because not
4 every fact pattern is the same, and we think this is
5 appropriate.

6 MS. CLEARY: Thank you. Your Honor, we
7 appreciate the Government has tried to put into its
8 general discovery, general conspiracy law description
9 everything it hopes to explain for the elements, but
10 the difficulty is everything is kind of getting muddled
11 together.

12 What we would prefer is to use the pattern
13 conspiracy instructions for Count 1; where they differ
14 for Count 2, do as Your Honor suggested, put notes, how
15 it is different than the conspiracy elements in
16 Count 1, so that it is clearly set out for the jury, so
17 that there is no question, they don't have to go back
18 and parse through that general description to find out
19 exactly what the elements are.

20 THE COURT: Structurally, I would much prefer
21 that.

22 MR. SOFER: And Judge, again, the problem is
23 there are certain general --

24 THE COURT: Let me take a look at the
25 particular construction, okay? Which one are we

1 talking about?

2 MR. SOFER: Page 22, Instruction 18. It is
3 approximately two pages long.

4 THE COURT: Let me read it.

5 MR. SOFER: Again, I don't believe there is
6 anything particularly controversial about the substance
7 of what's here, although counsel may correct me.

8 THE COURT: So I read Number 18. What's the
9 problem?

10 MS. CLEARY: For comparison purposes, Your
11 Honor, I direct you to Instruction Number 25 on Page 30
12 of our proposed draft.

13 THE COURT: Okay. Give me half a second. It
14 looks like what I gave before.

15 MS. CLEARY: It could very well be, and it
16 was pulled from the pattern. One of the points of
17 contention we have is when you look at the Government's
18 first element, which is agreement, they refer you back
19 to their general description of conspiracy law, whereas
20 we propose the element that is drawn from the pattern
21 instruction, so that the jury clearly understands what
22 they need to consider to determine if there is an
23 agreement.

24 MR. SOFER: And Your Honor, I guess the
25 Government's position would be if -- first of all, we

1 feel strongly that jury instructions, if you compare
2 the volume of guidance that is given to the jury, the
3 pattern instruction to Jury Instruction Number 18 that
4 the Government has proposed, it is -- it is stripped
5 down in a way that causes all kind of potential
6 confusion.

7 There are a number of concepts in the
8 criminal conspiracy generally section that are laid out
9 in much greater detail, explaining concepts that are
10 beyond that which the pattern instruction would
11 explain.

12 If what counsel -- and we talked about this.
13 What counsel is -- I think if counsel wants this
14 general, the language about agreement to be associated
15 with the particular charges, that is fine. The
16 Government thought about doing that, but then we would
17 ask that you repeat Number 18, not the pattern
18 instruction, within the two substantive counts.

19 If you don't do that, you strip it down to
20 just the pattern instructions, which by the way I
21 believe also could cause a problem with the mens rea
22 elements in both of those two counts. Then what you do
23 is you lose -- you both potentially tamper with the
24 mens rea, but you also then lose this more detailed
25 analysis of conspiracy law, which we believe is more

1 accurate, and again, I don't think there is anything --
2 and counsel has objected, in the back they objected to
3 specific portions, both of which have been brought to
4 Your Honor's attention, there is another issue coming
5 up, but we would ask, then, that for the agreement
6 portion, that is, the agreement element, that we --
7 that we twice read 18, or twice include the
8 Government's proposed jury instruction, because all of
9 that language pertains to an agreement.

10 THE COURT: Well, you probably didn't move
11 the ball very far down the field, but why don't you say
12 "criminal conspiracy-agreement" rather than in general?
13 If all the language refers to agreement, does that help
14 resolve some of the problems?

15 MR. SOFER: I think this section includes
16 language that applies beyond agreement, to other
17 aspects of the conspiracy law, including duration of
18 when someone might be able to come in or leave a
19 conspiracy --

20 THE COURT: I can break that out --

21 MR. SOFER: We could break it out.

22 THE COURT: -- and subsection it with
23 separate instructions. I tend to have -- it tends to
24 be my preference to have separate instructions for
25 separate concepts.

1 MR. SOFER: The Government certainly wouldn't
2 disagree with trying to put subheadings in here.
3 Again, the concept here is give the jury an idea, like
4 Your Honor did in the preliminary instructions but with
5 much more detail, and I think we discussed -- as I
6 remember, when we discussed the preliminary charge,
7 that it would not be a good idea at that juncture to
8 add a whole -- we had a much more comprehensive
9 suggestion on conspiracy law at the beginning of the
10 preliminary charge as well.

11 Now, to not include these other concepts I
12 think would be a serious mistake. We can try to break
13 it down so that it is done generally, and then
14 agreement. I don't know whether that would satisfy
15 counsel. I think they want the agreement language to
16 be embedded in each of the substantive counts.

17 THE COURT: I would prefer not. Not if it is
18 the same language.

19 MR. SOFER: That's exactly what we thought,
20 and that's why we tried to do it this way. We thought
21 it would make things go faster, not slower.

22 So if it is acceptable to Your Honor, what
23 we'll -- and counsel, I don't know whether you agree or
24 disagree with this, but we certainly can break down 18
25 into at least two instructions, one that relates to

1 conspiracy law in general and then one that relates to
2 the conspiracy law as it relates to agreement, and then
3 we would ask that Your Honor reference that when you
4 are going through the specifics.

5 THE COURT: Yes, because I previously
6 instructed you in instruction number whatever. The
7 Government must prove the existence of an agreement, as
8 defined in that instruction.

9 MR. BOSS: Your Honor, on behalf of the
10 defendant El-Hindi, we certainly agree that brevity is
11 appropriate. We agree that there is no need to repeat
12 whole sections of instructions in the two conspiracy
13 charges, but we do request that the Court adhere to the
14 pattern instruction whenever possible. Thank you.

15 THE COURT: Again, that is my instinct and
16 intention and desire.

17 MR. BOSS: Well, that is our request. Thank
18 you.

19 MR. SOFER: And again, we don't necessarily
20 disagree with that on most of these things, but I think
21 if you take a look at what we've suggested and compare
22 it --

23 THE COURT: It's fair to say I think a way to
24 do this is to probably put conspiracy hyphen generally,
25 or conspiracy hyphen agreement, either before the

1 two -- probably after the two elements charges. Count
2 whatever it is -- count one charges this, and if you
3 prove that, the Government must prove this, these
4 elements; the next count charges that to prove that,
5 the Government has to prove these elements, and then
6 perhaps say with regard to agreement, to find the
7 defendant guilty of either Count 1 or Count 2, the
8 Government must prove the existence of an unlawful --
9 of a conspiratorial agreement, and then I instruct you
10 that a conspiratorial agreement, to prove that, the
11 Government has to prove the following.

12 MR. SOFER: I would respectfully say, Your
13 Honor, I think the better course would be to put the
14 general language first, only because I think that's
15 generally the way it is done, but also if you go from
16 the general to the specific as opposed to from the
17 specific to the general, I think that is more difficult
18 in terms of the retention.

19 THE COURT: That's not a big deal.

20 MR. WITMER-RICH: If I could just briefly try
21 to illustrate for Your Honor what we're trying to
22 accomplish here, if you look at Jury Instruction
23 Number 20 on the Government's proposed instructions,
24 that's the charge for the first count. If you look at
25 the second page of Jury Instruction Number 20 --

1 THE COURT: Yes. I mean, I would suggest
2 taking this out. I mean, it is a conspiracy. You can
3 say something, you know, in this -- to find the
4 defendants guilty of this count, the Government must
5 prove that the defendants conspired or agreed to do X,
6 and then there is a cross reference. I remind you of
7 my earlier definition of what the Government must prove
8 in order to prove a conspiratorial agreement.

9 MR. SOFER: I think that's exactly what's
10 there, Judge.

11 MR. WITMER-RICH: The puzzling part to me --

12 MR. SOFER: The first element, agreement to
13 murder or maim outside the United States, it says that
14 we must prove the defendants entered into an agreement,
15 and then a very brief description of that, as opposed
16 to this lengthy kind of description that's in the
17 general charge. The elements regarding conspiracy law
18 that I have just instructed you about in Instructions
19 18 and 19 apply to this criminal count.

20 MR. WITMER-RICH: The puzzling thing about
21 this instruction to me is that Jury Instruction 21, the
22 first element, conspiracy, goes on for about a page and
23 a half, and includes a lot of kind of language -- I'm
24 not actually sure if it is repeated from the earlier
25 stuff or -- again, it is explaining what that means in

1 that context and not explaining what it means in the
2 first count, even though I think in most respects, not
3 entirely, but in essence, it is the same.

4 THE COURT: It looks like -- I see what you
5 are saying.

6 MR. SOFER: But that again, Judge, is not
7 because of the peculiarities of this particular
8 statute. The litigation that has taken place around
9 the country before this case --

10 THE COURT: I'm looking at Instruction 21,
11 the second paragraph after the caption "first element,
12 conspiracy."

13 MR. SOFER: I'm sorry? Direct us again to
14 where you are.

15 THE COURT: Instruction 21. There is a
16 caption, a centered caption, "First element, colon,
17 conspiracy," and then the second paragraph after that,
18 which begins "the Government need not prove."

19 MR. SOFER: That's right, Judge. And this
20 is, again, a recapitulation. I think this is repeated
21 twice. That is, the portions that don't relate to
22 general conspiracy I believe are repeated twice in the
23 substantive charges --

24 THE COURT: Looks to me like the second
25 paragraph replicates if not duplicates what they were

1 told in 18.

2 MR. WITMER-RICH: I think it actually
3 replicates the second element, willful participation,
4 or replicates parts of it, the second element from the
5 first charge.

6 THE COURT: I mean, "presence at the scene"
7 -- I'm skimming. "Mere acquiescence" -- I mean, all
8 that stuff seems to me ought to be, and I assume
9 probably is contained in 18.

10 MR. WITMER-RICH: It is not, actually.

11 MR. SOFER: It is not, Judge, again, because
12 it more specifically goes to this particular charge,
13 and had we put it in 18, since it doesn't apply
14 necessarily in the same way to both the conspiracy
15 charges, we were concerned that if we had put all of
16 this language into the general conspiracy instruction
17 that we would somehow be tweaking and potentially
18 influencing the differences between the two statutes.

19 I would just note that, again, what we tried
20 to do here is also -- there are a number of cautions in
21 this, in this section as well.

22 THE COURT: Well, I tell you, I don't think
23 we can resolve this today. By mid afternoon on Monday,
24 state your reasons for me for your different versions.
25 I'm just going to have to sit down and spread them out

1 in front of me.

2 MR. WITMER-RICH: We will try to come up with
3 a version that fits within the Government's structure,
4 I believe. I mean, the more overall structure. We'll
5 try to fit them within this version. But it will be --

6 THE COURT: There are common attributes that
7 are universally applicable attributes of an unlawful
8 conspiracy that I think I should tell the jury, and I
9 think Mr. Sofer is probably right. Do it at the
10 outset, and then where there is a distinction,
11 knowingly, willfully, then fine. And if there is
12 something about the killing or maiming conspiracy that
13 differs from the material support conspiracy, then to
14 prove a defendant guilty of this charge, you must find
15 that the conspiracy involved related to -- whatever the
16 very discrete distinction is.

17 MR. SOFER: The classic example would be one
18 requires an overt act and the other doesn't, and that's
19 why we couldn't get it all in the first instruction

20 THE COURT: There is a lot in here that looks
21 kind of redundant, or ought to have been in the
22 general.

23 MR. WITMER-RICH: We'll work on a version
24 that we think accomplishes what we're trying to do, and
25 perhaps the Government will do the same.

1 MR. SOFER: We'll send them back and forth.

2 THE COURT: And if you send me a blank E-Mail
3 on this, that would be just fine.

4 MR. SOFER: Let me, Your Honor, go on to the
5 other specific points that maybe we can resolve in the
6 time that we have left.

7 At the bottom of the Government's general
8 conspiracy instruction, there is a sentence that says
9 "Finally, the defendants cannot conspire" --

10 THE COURT: Wait, wait.

11 MR. BOSS: Which one is that?

12 MR. SOFER: This is Number 18. I apologize.

13 THE COURT: Wait a minute, please. It is the
14 last paragraph? Okay.

15 MR. SOFER: The sentence and paragraph that
16 starts "Finally, the defendants cannot conspire with
17 only a Government agent. A Government agent thus
18 cannot be the only other member along with a single
19 defendant in a conspiracy." The defense counsel would
20 like to insert Darren Griffin's name here, and our
21 position is that is glaringly obvious from the
22 evidence, and not necessary in the charge.

23 THE COURT: I agree.

24 MR. SOFER: And is sort of overkill.

25 THE COURT: I agree. I agree.

1 MR. SOFER: Jury Instruction Number 19 has to
2 do with something we've discussed numerous times at the
3 bench, which is why we did break this out on -- maybe
4 this will be ultimately the best way to do it, to try
5 to break these particular concepts out, but this is the
6 notion -- and again, I think it is something that could
7 be, without some sort of illustration here, incredibly
8 confusing to a jury if it is not laid out clearly, and
9 this talks about when a conspirator is responsible for
10 the actions of another conspirator, and the only thing
11 I think we have an objection on here is the last
12 sentence in the first paragraph, which starts with the
13 words "this is true." It says, "This is true because a
14 conspiracy is a kind of partnership, so that under the
15 law each member is an agent or partner of every other
16 member and each member is bound by a" --

17 THE COURT: Slow. It is late in the
18 afternoon. Judy is good, but --

19 MR. SOFER: I'm sorry, Judge. "This is true
20 because a conspiracy is kind of partnership, so that
21 under the law each member is an agent or partner of
22 every other member and each member is bound by and
23 responsible for the acts and statements of every other
24 member made in pursuance of that unlawful scheme."

25 The defense would like that removed. We

1 found this, we believe, in the Eighth Circuit pattern
2 instructions, and believe that it is a true statement
3 of the law.

4 THE COURT: West of the Mississippi.

5 MR. WITMER-RICH: I believe the first
6 sentence --

7 THE COURT: Do we have a pattern in our
8 Circuit on this?

9 MR. SOFER: The Sixth Circuit manual on
10 conspiracy, pattern instructions, Judge, are what I
11 would describe as -- "fairly lean" is the word that was
12 given by one of my colleagues. And again, were it not
13 for the complexity of this case, were we talking about
14 a simple, easy drug conspiracy, I would say that it
15 might suffice here. Here, given the factual
16 complexities of the case, we think we're going to end
17 up with the jury being very confused without some
18 further guidance from the Court.

19 MR. WITMER-RICH: I think our basic point
20 here, and we're trying to -- there is a Sixth Circuit
21 instruction regarding *Pinkerton* liability --

22 THE COURT: *Pinkerton*?

23 MR. WITMER-RICH: *Pinkerton*, but we've not
24 had a chance to examine how that relates to this
25 specifically.

1 THE COURT: Which is what this is?

2 MR. SOFER: No, Judge. *Pinkerton* liability
3 is that we conspire to do something and it is
4 reasonably foreseeable that one of us, would say, kill
5 a bank guard, and I would end up being charged
6 substantively with the shooting of the --

7 THE COURT: Shooting of the bank teller.

8 MR. SOFER: And here we're talking about the
9 agency relationship that exists between
10 co-conspirators.

11 THE COURT: Let me take a look.

12 I don't think we need that explanatory
13 language. I would prefer -- I mean, that is something
14 you can point out in argument, like an agent or a
15 partner with each other. The statement of the law
16 seems to me to be complete and adequate. When we just
17 tell them, look, if two people are members of a
18 conspiracy and it has been proven beyond a reasonable
19 doubt, what one says or does in furtherance of the
20 conspiracy is charged to indeed the act or statement of
21 the other.

22 MR. WITMER-RICH: Your Honor, the first
23 sentence completely encompasses it, and the second
24 sentence really is not a requirement.

25 THE COURT: So I'm not sure there is anything

1 unique about this case that requires any elaboration.

2 MR. SOFER: I think it explains the concept
3 in sort of more laymen-like terms to the jury. I don't
4 believe I could argue this, by the way, to the jury.
5 That would be to some extent, I mean, I certainly --

6 THE COURT: I really would rather not. I
7 prefer to give a somewhat sparser, though hopefully
8 entirely accurate statement of the law and proposition,
9 and it is just my thinking that long instructions like
10 this, complicated, the more you get in there, the
11 harder it is for the jury to understand.

12 MR. SOFER: Very well. We'll concede that on
13 this particular point.

14 THE COURT: Next?

15 MR. SOFER: Although, again, I would caution
16 the Court against too sparse an instruction on the
17 conspiracy law. I think what you will end up with
18 instead, Your Honor, are lots of questions from the
19 jury. This is sort of an aberration of something that
20 was laid out in the charge. There are other portions
21 of our conspiracy charge which, if they are not in
22 there, the jury will never hear anything about them,
23 and I think that would be a more significant error.

24 The next portion, Your Honor, that counsel
25 objects to, this is a pervasive issue, we had a debate

1 about, and I'm referring to Jury Instruction Number 20,
2 but it will apply to much of what follows here.

3 The statute itself, which is 18 U.S.C. 956,
4 conspiracy to kill, kidnap, maim or injure persons in a
5 foreign country, I don't think that -- I'm not sure
6 whether counsel disagrees with the word "kill" there,
7 but that is -- once again, that is the title of the
8 statute. They would like us, however, throughout the
9 rest of -- I guess, I don't know, I don't want to
10 engage in colloquy with counsel. They may object to
11 the word "kill" even in the statute, but they would
12 like the word "kill" from then on to instead be
13 replaced by the word "murder" or "manslaughter" and
14 then have a definition of murder or manslaughter which
15 is contained in our definition because, as a matter of
16 fact, if you look at the first element, it says two or
17 more persons --

18 THE COURT: Slower.

19 MR. SOFER: The first element in our proposed
20 instruction is that two or more persons conspired to
21 murder or maim a person or persons at someplace outside
22 the United States, and then our instruction includes
23 the definition of murder and maim.

24 Our disagreement with counsel is that they
25 want one step of specificity too much in terms of,

1 again, confusing the jury.

2 Kill is defined as murder, manslaughter,
3 voluntarily manslaughter or involuntarily manslaughter
4 under the statute. I think counsel may want to argue,
5 or at least leave the door open that what the
6 defendants were preparing for or conspiring to do, to
7 the extent that they are doing any of that, per the
8 defense argument, is to perhaps kill, but perform
9 killing that would not under U.S. law equal a murder,
10 and that would be something, for instance, that would
11 be self defense.

12 So someone who is training to go to a
13 shooting range and is training for an interloper
14 perhaps to come in their home and kill that person,
15 that might not be murder. It might be murder anyway
16 under a whole variety of different scenarios, and our
17 whole argument is that kill, the statute is entitled
18 kill, that this charge, again, this charge has been
19 given in the past, it has been approved of in the past
20 by courts --

21 THE COURT: Let me hear what their problem
22 is.

23 MR. WITMER-RICH: The statute, the statute
24 again has the word "kill" in the title, but the word
25 "kill" is not in the text of the statute. The statute

1 prohibits conspiracy to do an act that would constitute
2 the offense of murder or maiming if committed in the
3 United States, basically.

4 The elements here, down below, correctly
5 state two or more people conspire to murder or maim,
6 and then it defines murder or maim later, so the
7 problem, the small problem that is presented right here
8 is in the first sentence, where we are stating what the
9 charge is, and I want to say here "conspiring to murder
10 or maim" which is what the first element of the statute
11 states, rather than "conspire to kill or maim."

12 THE COURT: It would be my understanding,
13 even though the title as far as the caption, as far as
14 statute, what the statute prohibits is found in the
15 text of the statute. In other words, I think it should
16 refer to murder rather than kill, because that is what
17 they have to prove. So I tend to agree with the
18 defendant. We should say in this third line, "conspire
19 to murder or maim," and we have murder later. So what
20 other objections do you have to this instruction?

21 MR. WITMER-RICH: That's kind of the
22 recurring one.

23 MR. SOFER: I apologize.

24 THE COURT: I asked what other objections.
25 He said that is a recurring objection.

1 MR. SOFER: It is a recurring objection.
2 Again, I would like an opportunity to at least on this
3 one to go back to our headquarters and see why it is
4 that the "kill" was something that they --

5 THE COURT: And you can tell them what I just
6 said. While I agree with you so far, until they tell
7 me otherwise, with regard to the other issue, that the
8 caption is part of the statute, it is my understanding
9 that when it comes time to define what an element is,
10 what the Government has approved, you look to the text
11 of the statute, and candidly, I would be very troubled
12 if I used the word "kill" instead. That could well be
13 reversible error. It could be one of those kinds of
14 structural errors that relieves the Government of an
15 element of its proof.

16 MR. SOFER: Again, Judge, we'll take a look
17 at it and come back --

18 THE COURT: And if you are still at
19 loggerheads, I trust that Mr. Witmer-Rich will remind
20 me what I said.

21 MR. WITMER-RICH: I think I will.

22 MR. SOFER: I'm certain he will, Judge.

23 We have, I guess, a rehash, then, of the
24 other language that is contained in willful
25 participation in the agreement, which is found as part

1 of the first element, the agreement to murder or maim
2 outside the United States, and here again, Judge, I
3 guess we'll try to work this out because this sort of
4 goes back to this general conspiracy language.

5 THE COURT: Okay.

6 MR. SOFER: There is a whole lot of this.
7 Jury Instruction Number 21 is the 2339(a) charge, which
8 is conspiracy to provide material support or resources
9 to terrorists. Again, this is the caption of the
10 statute. Counsel is --

11 THE COURT: We'll bicker --

12 MR. SOFER: Understood.

13 THE COURT: Bring that back to me.

14 MR. SOFER: Now, here we have another
15 objection to the word "killing," but here the statute
16 talks about providing material support that is alleged
17 to have been in furtherance of a violation of another
18 statute, which is the killing of a United States
19 national, and that refers to 2332, which specifically
20 discusses United States nationals --

21 THE COURT: And in that, I would be inclined
22 to agree with the Government. That is a different,
23 candidly, lesser environment.

24 MR. WITMER-RICH: And the statute is actually
25 structured in a slightly odd way, but what it says is

1 whoever kills a national of the United States while
2 such national is outside of the United States shall, if
3 the killing is murder, be punished in one way; if the
4 killing is a voluntary manslaughter be punished in
5 another way, if the killing is an involuntary
6 manslaughter be punished in another way, so that if it
7 does not constitute murder or manslaughter, it is not a
8 violation of the statute.

9 MR. SOFER: Or involuntary manslaughter.

10 MR. WITMER-RICH: So I ask for the same
11 distinction. I think the words "murder" or
12 "manslaughter" accomplishes --

13 MR. SOFER: But the notion that you are going
14 to break down for the jury the difference between
15 murder, voluntary manslaughter and involuntary
16 manslaughter in this regard again I think is one step
17 removed from what the statute --

18 THE COURT: I readily admit I don't know what
19 I'm talking about, but is there an *Apprendi* issue
20 lurking in all that?

21 MR. SOFER: No. The penalty of 2339(a),
22 which the statute instructs on, is not in any way
23 affected by each of these three theories --

24 THE COURT: I'm going to accept the
25 Government's proposition, that I do not charge the

1 separate levels.

2 MR. WITMER-RICH: And again, I'm not
3 requesting a charge for three separate levels or
4 anything like that. I'm requesting that the word
5 "kill" be replaced with the words "murder" or
6 "manslaughter". I think "manslaughter," the words
7 there would encompass both meanings of it. As defined
8 in another statute, that would be a one sentence
9 definition of manslaughter from the manslaughter
10 statute. We already defined what murder is and that's
11 what the statute covers. I'm not asking for, as Mr.
12 Sofer said --

13 THE COURT: What's the problem with having --

14 MR. SOFER: It is incredibly confusing and
15 completely unnecessary. The fact of the matter is,
16 if you kill a U.S -- kill a U.S -- that's the language
17 of the statute. Whether it is manslaughter, whether it
18 is involuntary manslaughter versus voluntary
19 manslaughter versus murder, it is completely inapposite
20 here in the sense that this is the sort of predicate
21 crime, if you will, that the 2339(a) conspiracy, which
22 is the charge that is being leveled against the
23 defendants, it counts -- the only thing that would be
24 cut out that is left from this would be -- then why not
25 give the jury an instruction on self defense, then?

1 How does a jury know what manslaughter is versus
2 involuntary manslaughter versus murder, or whether or
3 not a particular act is self defense or whether or not
4 there is a mistake or coercion or any number of these
5 other things? We've moved down so far into the weeds;
6 you start with 2339(a), which says you are providing
7 material support for another statute. That statute in
8 this case is the murder or maiming or killing of a U.S.
9 national overseas, and now you are going to tell the
10 jury that the Government killing has to be murder or
11 manslaughter, and --

12 THE COURT: Okay. He made his objection and
13 I'm going to do as you ask, and if we're back here in
14 two years --

15 MR. SOFER: I will be very sorry, Judge.

16 THE COURT: He can say I told you so. Okay?

17 MR. SOFER: Again, one of the --

18 THE COURT: Without getting him in any
19 trouble. Go ahead.

20 MR. SOFER: I think that's it in terms of --

21 MR. WITMER-RICH: Let me -- I would briefly
22 bring up the terrorist issue again, which is -- apart
23 from the caption now on this one, on Jury Instruction
24 Number 21 --

25 THE COURT: Whereabouts? Read the first,

1 under what subheading --

2 MR. WITMER-RICH: Right at the beginning.

3 First sentence, the third line.

4 THE COURT: Wait a minute. I'm sorry. I
5 scrolled too far. Wait a minute, please.

6 Okay. Does it say "terrorist or terrorist
7 activity"?

8 MR. WITMER-RICH: Correct.

9 THE COURT: It does? Does not?

10 MR. WITMER-RICH: It is not in the statute,
11 Your Honor.

12 THE COURT: Then take it out.

13 MR. SOFER: The problem with doing that is
14 what -- if you just take it out, it says "conspire to
15 provide material support or resources in violation
16 of" --

17 THE COURT: It says "to terrorists." Again,
18 I have no problem with repeating the statutory caption.

19 MR. SOFER: So again, our concern is that you
20 risk confusing the jury. You have to say something.
21 Resources to whom?

22 THE COURT: No. That's what I'm saying. I
23 think it is consistent for me to say that you can, say
24 in the third line, Mazloun, close bracket, conspired to
25 provide material support or resources to terrorists, in

1 violation, and delete "or terrorist activity."

2 MR. SOFER: I'm sorry, Judge. The way the
3 precise words are used, the way the statute is written,
4 it refers to a litany of other criminal activity that
5 could be the basis for this particular charge.

6 We gave the resources in order for one of
7 these other crimes. The vast majority of these crimes
8 fall under the U.S. Code heading of terrorism. That
9 is, there is a whole litany of crimes which are in the
10 chapter, the Title 18 chapter that deals with
11 terrorism.

12 MR. TERESKINSKI: Chapter 113(b), for the
13 record.

14 MR. SOFER: Some of those crimes, though,
15 relate back to crimes that are farther back in the
16 code, like Section 32, which I think has to do with
17 aircraft piracy or something like that, which have been
18 characterized, because they don't fall under that
19 chapter as terrorism, they are characterized as
20 terrorist activity. All this is an attempt to do is
21 qualify all the different statutory predicates for the
22 conspiracy, so unlike 2339(b), which is a statute which
23 says if you give money to Al-Qaeda, which is a
24 designated terrorist group, there is almost sort of a
25 strict liability about that to some extent. Here you

1 have to know that the support you are giving is going
2 towards forwarding one of these other crimes, and they
3 fall into two categories. They either fall under the
4 title, the chapter of the code that is terrorism, or
5 one of these other activities which have been loosely
6 defined as terrorist activity. That's where the
7 language comes from, and why it is used this way
8 before, and the high courts have accepted it because
9 those statutes in fact are either terrorism under the
10 U.S. Code, or defined activity which is terrorist
11 activity, like hijacking airplanes, blowing up ships,
12 et cetera, et cetera.

13 THE COURT: But the point is, none of that is
14 at issue here, because you point specifically to
15 2332(a), killing a national, rather than committing air
16 piracy or whatever. Or am I missing something?

17 MR. SOFER: I would say there it is more --
18 if you had to pick one of them, it is more terrorist
19 activity than it is aiding a terrorist, because you are
20 talking about murdering a United States national
21 overseas, and by the way, 2332 has a provision in it,
22 which we discussed --

23 THE COURT: This is what I was trying to
24 grope for before. Wouldn't it make better sense to
25 restructure this entirely, beginning with the caption,

1 and call this a conspiracy to provide material support
2 or resources to, either to persons engaged in the Iraq
3 insurgency, or to those engaged in activities directed
4 or with a purpose to kill or maim Americans? In other
5 words, conflate the two and make it -- and take the
6 terrorism out of it, and focus on the killing or
7 maiming. In other words, link the two more
8 specifically, both in the title of the instruction, but
9 then how we refer to it.

10 And I'm not doing this because of their
11 concern about waving the red flag of terrorism. It is
12 more just the finesse of this whole issue. You have
13 the terms out there, and bingo, you are talking about
14 killing and maiming Americans, and rather than
15 referring to them in the generic or general sense,
16 conspire to provide material support or resources to
17 persons outside the United States. Is that part of it?

18 MR. SOFER: No, Your Honor.

19 MR. WITMER-RICH: In furtherance. The
20 killing of a United States national outside the United
21 States.

22 THE COURT: That's what I meant.

23 MR. SOFER: Again, this is no different than
24 any other -- first of all, Congress called this statute
25 what it called it. It refers to activities within the

1 Code that are either -- the fact of the matter is they
2 are either terrorism or terrorist activity. I don't
3 think there is any debate about that. Aircraft
4 piracy --

5 THE COURT: I believe at times I referred to
6 terroristic acts.

7 MR. SOFER: Perhaps, Your Honor.

8 THE COURT: I prefer that to terrorist
9 activities, terroristic acts. Whether Congress used it
10 or not, I understand that. I'm just trying to be as
11 precise as possible with regard to what the defendants
12 are actually charged with in this case.

13 MR. SOFER: I understand, Judge.

14 THE COURT: And I think we're getting hung up
15 on the label rather than on the actual elements, what
16 it is they are charged with doing.

17 MR. SOFER: I could not agree more with the
18 Court, and the fact of the matter is this is an
19 instruction that goes on for a total of about six or
20 seven pages, which very concisely describes --
21 "concisely" may be the wrong word -- precisely
22 describes all of what you are saying. There is no
23 question that ultimately the jury is being told exactly
24 what we have. The elements are all described in
25 detail, exactly what they have to find.

1 What we're debating about here is this title,
2 and the notion counsel is concerned about, it is about
3 raising the red flag of terrorism, and again, what I
4 would say is the same thing I said before, which is
5 this is what the statute says. This is what the
6 statute refers to. I don't necessarily -- while I
7 understand why the Court and counsel are understandably
8 concerned about so-called, so-called red flag of
9 terrorism --

10 THE COURT: It is simply focusing the jury on
11 what it is precisely. The statute that is the
12 consequence of the objective of the conspiracy. That's
13 all.

14 MR. SOFER: And Your Honor, in this
15 particular charge, the terms that we're talking about
16 are used a grand total of two or three times. There is
17 no -- at no time does this -- if you read it all
18 together, Judge, I would submit to you that that
19 concern is not something that the Court should be
20 concerned about. We're talking about a label here. It
21 is the label the drafter of the statute came up with.
22 It is an accurate label, I believe, under the law. The
23 notion that you could kill a national overseas --

24 THE COURT: I understand. I agree. It is a
25 temporary activity.

1 MR. WITMER-RICH: No, Your Honor, it is not.
2 Respectfully -- I'm sorry. The fundamental point here
3 is that a conspiracy to provide material support, let's
4 think of a, you know, members of the Russian Mafia in
5 the United States who are conspiring to provide
6 material support to groups overseas, who are going to
7 kill a group of American businessmen for, you know,
8 purposes related to their Mafia activities. There is
9 no legal definition, certainly not in this statute, of
10 what is terrorism and what is not terrorism. It is not
11 defined under any commonly-understood definition of the
12 term. What I just described is not terrorism. It is a
13 serious Federal crime. It is not terrorism. It has
14 nothing to do with a political goal. It is not
15 targeting civilians for some political purpose.

16 There is a wide variety of definitions of
17 terrorism, none of which exist in the statute, and many
18 acts which would fall under this statute are not under
19 any reasonable sense of the word terrorist acts. If
20 the word "terrorist acts" had some meaning in this
21 statute, it would be limiting what was there, in which
22 case I would be happy for it, because it would limit
23 what the defendants could be guilty of, but it doesn't.

24 MR. SOFER: Actually, it does, with all due
25 respect. 2332, which is the killing of a United States

1 national, is not so narrowly defined. It is a
2 terrorist statute. It cannot be charged unless there
3 is a certification by the Attorney General of the
4 United States that in fact -- "No prosecution for any
5 offense described in this section shall be undertaken
6 by the United States except on written certification of
7 the Attorney General or the highest ranking subordinate
8 of the Attorney General with responsibility for
9 criminal prosecution that in the judgment of that
10 certifying official, such offense was intended to
11 coerce, intimidate, or retaliate against a government
12 or civilian population." That certification and the
13 definition therein has regularly been used by the
14 United States Government as one of the definitions of
15 terrorism, to commit an act of violence with that
16 intent.

17 Now, this has always been litigated at
18 length, in fact been litigated in this case, Your
19 Honor. The fact that the Attorney General did not
20 certify that in this case is not germane. Even if we
21 charged 2332, the defense does not get to litigate the
22 certification anyway. But the statute is not as broad
23 as counsel has implied. It is related to terrorism by
24 the application of that certification by the Attorney
25 General.

1 So again, we are not suggesting putting the
2 word "terrorist" and "terrorist activity" in the
3 elements of this charge. You won't find them in the
4 specific elements. It is only a label to attach to the
5 type of activity that has to be forwarded and the
6 statute itself, and those things I think are, are clear
7 as day. The statute says it itself, and it refers to
8 all these other statutes which fall into one of these
9 other categories, either helping terrorists or helping
10 terrorism activities or terroristic activities. Either
11 way, I just don't think that is a controversial
12 concept. In the end, I believe what counsel is most
13 worried about is this red flag of terrorism, and I
14 think the Court has bent over backwards in this case to
15 insure that this jury does not inappropriately taint
16 the mention of the word "terrorism" to mean the
17 defendants should be found guilty of anything, or
18 inflame the passion in any way. The Government has
19 been careful of that as well. We're not trying to
20 incite passion. We're simply referring a statute the
21 way it has been referred to in every criminal
22 prosecution I'm aware that the United States has
23 undertaken under this statute, and again, our charge
24 here is derived from charges given in case after case
25 after case, where again Courts have found this to be an

1 ordinary exercise of jury instructions.

2 MR. WITMER-RICH: Your Honor, it is striking
3 to me that counsel used a part of the statute that
4 provides for a certification that was not done in this
5 case as an example of why the word "terrorism" should
6 appear in this charge. He also made much of the fact
7 that it appears only a couple times, very early on,
8 which makes me wonder, why does the Government so
9 vehemently want that language in the front of this
10 charge? It goes on to define the elements of the
11 charge. The elements do not contain the word
12 "terrorism." It is not part of the legal definition of
13 what is going on here. They are fighting very hard to
14 get the words terrorist, terrorist activity,
15 terroristic or specified terrorist activity in the
16 first two paragraphs. They are free to argue in front
17 of the jury, and they did in opening argument, this is
18 a terrorism case --

19 THE COURT: I gather you would prefer that
20 the caption be "conspiracy to provide material support
21 to persons engaged in certain activities"?

22 MR. WITMER-RICH: Yes, Your Honor. And the
23 same in the text of the instruction.

24 MR. SOFER: And again, I guess my
25 objection -- we're not fighting to get the word

1 "terrorism" into the case. I guess we're fighting for
2 what seems obvious to us, Judge, and to the Government,
3 which is -- I know you don't -- the Court has been very
4 careful about limiting this, but this is a terrorism
5 case. Like it or not, that's what we have here. Those
6 are the -- Congress has passed these statutes --

7 THE COURT: I understand that, but, you
8 know --

9 MR. SOFER: It just seems like we are so, we
10 bent over backwards so much to avoid it that we're
11 ignoring reality at some point, and I don't think
12 that's fair.

13 THE COURT: I don't think you are. This case
14 has got plenty of evidence, much of it graphic, all of
15 it I think properly admitted to the jury, of the kinds
16 of activities that are killing and maiming American
17 soldiers. We've witnessed that.

18 Give me half a second. Well, I need to leave
19 because I'm going to be late for a meeting. I'm going
20 to leave you with -- in thinking about this, I think it
21 would be much better to caption this "conspiracy to
22 provide material support or resources to persons
23 engaged in certain violent activities," and then to
24 read "Count 2 alleges the defendants conspired to
25 provide material support or resources to persons

1 engaged in certain violent activities, in violation of
2 2339(a)." The statute reads "material support need not
3 be to a particular specified person or persons engaged
4 in the violent activities encompassed by Section
5 2339(a)" -- I'm going to just E-Mail this to you, and
6 then you can respond to this with revised wording, with
7 your objections. It does what I think should be done.
8 It links the killing or maiming, what is going on, what
9 they are alleged ultimately to have been involved in
10 trying to do, and obviously, I've lost the -- I
11 apologize. I'm going to be -- there is somebody I must
12 meet, and I'm going to send this to you. I apologize.
13 I really have to go.

14 Rather than wait until -- can somebody be
15 available Tuesday morning? Tuesday, maybe at 11:00 or
16 whatever?

17 MR. WITMER-RICH: Yes, Your Honor.

18 MR. SOFER: Your Honor, is there any chance
19 we could do it before then?

20 THE COURT: I can't. I'm leaving tomorrow
21 afternoon and performing a wedding Sunday and coming
22 home and headed up to Cleveland. We have a Judges'
23 meeting. Well, maybe 4:00 or so Monday afternoon, I
24 can be available.

25 MR. SOFER: Certainly the Government can.

1 THE COURT: I won't look at anything, but
2 I'll basically come here from there.

3 MR. WITMER-RICH: We can be available, Your
4 Honor.

5 THE COURT: Let me give you my number. You
6 can try to track me down.

7 MR. SOFER: If not, Your Honor, we would do
8 this here in Court on Tuesday morning.

9 THE COURT: Yes, but let me tell this to my
10 secretary.

11 MR. SOFER: The thing that I wanted to
12 mention, Your Honor, it may or may not influence the
13 Court at all, is the fact that you have already given
14 this jury a preliminary charge on this particular
15 item --

16 THE COURT: I'm sorry. Okay. I told both my
17 secretary and the Clerk that we'll be with you Monday
18 afternoon. I will be here at 4:00, and we'll go from
19 there. Okay?

20 MR. SOFER: Very well, Your Honor.

21 MR. WITMER-RICH: Thank you, Your Honor.

22 MR. BOSS: Thank you, Judge.

23 (Proceedings adjourned at 6:14 p.m.)

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C E R T I F I C A T E

I, Judith A. Gage, Federal Official Court
Reporter, certify that the foregoing is a correct
transcript from the record of proceedings in the above
entitled matter.

A handwritten signature in cursive script, reading "Judith A. Gage", is written over a horizontal line.

September 2, 2008